

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2012-000417-001 DT

01/18/2013

THE HON. CRANE MCCLENNEN

CLERK OF THE COURT
J. Eaton
Deputy

STATE OF ARIZONA

STEPHEN N WILLIAMS

v.

AMMON MICHAEL SPRAU II (001)

AMMON MICHAEL SPRAU II
16442 N 152ND LANE
SURPRISE AZ 85374

REMAND DESK-LCA-CCC
SURPRISE MUNICIPAL COURT

RECORD APPEAL RULING / REMAND

Lower Court Case Number CR 10-01282.

Defendant-Appellant Ammon Michael Sprau II (Defendant) was convicted in Surprise Municipal Court of disorderly conduct and placed on probation. Defendant contends the trial court erred in subsequently revoking his probation. For the following reasons, this Court affirms the judgment and sentence imposed.

I. FACTUAL BACKGROUND.

On December 14, 2010, Defendant was cited for disorderly conduct (noise). On June 27, 2011, Defendant pled guilty to disorderly conduct. (R.T. of June 27, 2011, at 3, 6-7.) The trial court suspended imposition of sentence and placed Defendant on probation for 1 year. (*Id.* at 8.) One of the conditions of probation was Defendant would complete 120 hours of community service (restitution) no later than December 27, 2011. (*Id.*) The trial court additionally ordered that Defendant serve 60 days in jail, with those 60 days suspended upon successful completion of the 120 hours of community service (restitution).

On March 5, 2012, the State filed a Petition To Revoke Probation, contending Defendant had not completed his hours of community service (restitution) on time. On April 17, 2012, Defendant filed a Motion To Dismiss With Extreme Prejudice, contending the State filed the Petition To Revoke Probation 2 months prior to the deadline for Defendant's completion of the hours of community service (restitution). On May 9, 2012, the State filed an Opposition to Defendant's Motion To Dismiss Petition To Revoke Probation. On May 21, 2012, Defendant filed a Motion To Strike and Motion To Dismiss Pursuant to Rule 13.1(c) of the Arizona Rules of Criminal Procedure and the 14th Amendment.

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At the hearing on the State's Petition To Revoke Probation, the trial court noted Defendant was given until December 27, 2011, to complete 120 hours of community service work. (R.T. of May 21, 2012, at 4.) The trial court first addressed Defendant's Motion To Dismiss With Extreme Prejudice. (*Id.* at 5.) Defendant acknowledged he was not able to get the community service hours done in a timely manner, but said he had filed a motion for an extension of time. (*Id.* at 5–6, 14.) He also contended Judge Logan said on January 10, 2012, this was a moot point because, to the extent the State had alleged he violated the conditions of probation by failing to remain a law-abiding person, he had been found innocent of those other charges. (*Id.* at 6.)

The prosecutor noted Defendant had pled guilty in this matter, and the plea agreement provided Defendant would either serve 60 days in jail or complete 120 hours of community service within 6 months (which would have been by December 27, 2011). (R.T. of May 21, 2012, at 8–9.) The prosecutor further noted there was a notice from SAGE that Defendant had not completed his 120 hours of community service by December 27, 2011. (*Id.* at 9, 11.) He noted that, while Defendant was on probation, the State had filed against him another charge of disorderly conduct and a petition to revoke probation, but when it came time for trial, the victim did not appear, so the State had to dismiss the charges and the petition to revoke probation. (*Id.* at 9–10, 16.) The State had asked the trial court to revoke Defendant's probation because of his failure to complete the community service hours by December 27, 2011, but the trial court said the State would have to file a separate petition making that allegation. (*Id.* at 10.) As a result, the State filed the pending Petition To Revoke Probation on March 5, 2012. (*Id.*) Concerning Defendant's request for more time to do the community service hours, the prosecutor noted the plea agreement set December 27, 2011, as the deadline, thus that date could not be changed without the State's agreement. (*Id.* at 10–12.)

The trial court noted the following events. In October 2011, the State had filed a Petition To Revoke Probation alleging Defendant had failed to remain a law-abiding person. (R.T. of May 21, 2012, at 16.) In November, Defendant's attorney filed a motion to extend the completion date for the community service hours, but that motion was denied on December 19, 2011. (*Id.* at 16–17.) At the February 27, 2012, trial on the new charge of disorderly conduct, the victim failed to appear and thus the trial court had to dismiss both the new charge and the petition alleging Defendant had failed to remain a law-abiding person, and told the State to file a separate petition if they wanted to allege a violation for failing to complete the community service hours within the time specified. (*Id.* at 17.) The State did so on March 5, 2012. (*Id.*) Based on this recitation of the facts, the trial court denied Defendant's Motion To Dismiss With Extreme Prejudice. (*Id.* at 17–19, 22.) The trial court also denied Defendant's Motion To Strike and Motion To Dismiss Pursuant to Rule 13.1(c) of the Arizona Rules of Criminal Procedure and the 14th Amendment. (*Id.* at 22.)

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The trial court then proceeded with the hearing on the State's March 5, 2012, Petition To Revoke Probation. Defendant admitted he did not complete his community service hours by the deadline provided in the plea agreement. (R.T. of May 21, 2012, at 22.) Defendant submitted a document stating he had completed his community service hours. (*Id.* at 23.) The prosecutor noted Defendant was required to do his community service hours through SAGE, and the documentation from SAGE showed Defendant had not complete his community service hours by the deadline provided in the plea agreement. (*Id.* at 24–25.) The trial court noted Defendant's document showed he had completed 75 hours of community service by January 9, 2012, and found Defendant's documentation insufficient for two reasons: (1) the letters were not submitted by an agency authorized to provide community service, and (2) the letters did not state the date by which Defendant had done the community service hours. (*Id.* at 28, 49.) Defendant again admitted he had not completed his community service hours by the deadline provided in the plea agreement. (*Id.* at 29, 45.) The trial court therefore found Defendant had violated that condition of probation and revoked his probation. (*Id.* at 46.) The trial court sentenced Defendant to serve 60 days in jail, and ordered he was eligible for work release. (*Id.*)

On May 23, 2012, Defendant filed a timely notice of appeal. Defendant then filed the following motions on the dates indicated:

June 11, 2012, Motion To Vacate Judgment Pursuant to A.R.C.P. Rule 24.2.

June 18, 2012, Motion To Amend Appellant's Motion To Vacate Judgment.

June 18, 2012, Amended Motion To Vacate Judgment Pursuant to A.R.C.P. Rule 24.2.

On June 28, 2012, the trial court denied Defendant's Rule 24.2 Motions To Vacate Judgment. This Court has jurisdiction pursuant to ARIZONA CONSTITUTION Art. 6, § 16, and A.R.S. § 12–124(A).

II. ISSUES.

A. *Because Defendant pled guilty to the disorderly conduct charge, has he waived the right to appeal the judgment of the trial court granting the State's petition to revoke probation.*

The State notes Defendant pled guilty to the disorderly conduct charge, and contends Defendant has thus waived the right to appeal the judgment of the trial court granting the State's petition to revoke probation. If a defendant pleads guilty and is placed on probation, if the State files a petition to revoke probation and the defendant admits the violation, the defendant may not appeal from the subsequent judgment and sentence, but if the defendant contests the violation and the State proves the violation after a contested hearing, the defendant may appeal from the subsequent judgment and sentence. *State v. Regenold*, 226 Ariz. 378, 249 P.3d 337, ¶¶ 5–8 (2011) (defendant pled guilty and trial court suspended imposition of sentence and placed him on probation; state petitioned to revoke probation; after contested probation violation hearing, trial court found defendant had violated probation and sentenced him to prison; court held defendant was

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seeking review from contested hearing and not from plea agreement, thus defendant had right to appeal). In the present case, Defendant contested the State's petition to revoke his probation, and the trial court found the State had proved that alleged violation of probation, and then entered judgment and imposed sentence. Because Defendant appealed from a contested probation revocation hearing, he has not waived his right to appeal the judgment and sentence entered.

B. *Does this Court have jurisdiction to consider the issues raised in Defendant's Motions To Vacate Judgment.*

As noted above, Defendant filed his Notice of Appeal on May 23, 2012. After that date, he filed a Motion To Vacate Judgment, a Motion To Amend Appellant's Motion To Vacate Judgment, and an Amended Motion To Vacate Judgment, all of which were pursuant to Rule 24.2 of the Arizona Rules of Criminal Procedure. A ruling on a Rule 24.2 motion is a separately appealable order. *State v. Nordstrom*, 200 Ariz. 229, 25 P.3d 717, ¶ 88 (2001) (court did not agree with defendant's contention that automatic appeal of capital conviction carves out exception for denial of Rule 24.2 motion); *State v. Wynn*, 114 Ariz. 561, 562–63, 562 P.2d 734, 735–36 (Ct. App. 1977) (defendant was sentenced 1/26/76, filed notice of appeal 2/05/76, filed Rule 24.2 motion 2/17/76, which was denied 3/29/76; because defendant did not file separate notice of appeal from 3/29/76 denial, court held it did not have jurisdiction to review those issues raised in Rule 24.2 motion). In the present case, the trial court denied Defendant's various Rule 24.2 Motions To Vacate Judgment on June 28, 2012, but Defendant did not file a separate notice of appeal from that denial. This Court therefore does not have jurisdiction to review those issues raised in Defendant's Rule 24.2 motions.

C. (Defendant's Issues One) *Did the trial court abuse its discretion in denying Defendant's Motion To Dismiss With Extreme Prejudice and Defendant's Motion To Dismiss Pursuant to Rule 13.1(c) of the Arizona Rules of Criminal Procedure.*

Defendant contends the trial court abused its discretion in denying his Motion To Dismiss With Extreme Prejudice and his Motion To Dismiss Pursuant to Rule 13.1(c) of the Arizona Rules of Criminal Procedure, both of which alleged the State did not file the petition to revoke probation within the time limits provided in Rule 13.1(c) of the Arizona Rules of Criminal Procedure. That rule provides as follows:

c. Timeliness. An information shall be filed in Superior Court within 10 days after the determination of probable cause or the defendant's waiver of a preliminary hearing. Failure to file a timely information shall be grounds for dismissal of the prosecution on motion of the defendant under Rule 16.1(b). Such dismissal shall be without prejudice except that if the prosecution is refiled, the time limits under Rule 8.2 shall be computed from the initial appearance on the original complaint.

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Rule 13.1(c), ARIZ. R. CRIM. P. That rule governs when the State must file an information after a court has held a preliminary hearing under Rule 5.3 and has found probable cause under Rule 5.4 to believe the defendant has committed the charged offense. Rule 13.1(c) thus has no application to when the State may file a petition to revoke probation. This is instead governed by Rule 27.6, which contains no time limit. The trial court therefore correctly denied Defendant's Motion To Dismiss With Extreme Prejudice and his Motion To Dismiss Pursuant to Rule 13.1(c) of the Arizona Rules of Criminal Procedure.

D. (Defendant's Issues Five) *Did the trial court abuse its discretion in denying Defendant's Motion To Dismiss Pursuant to the 14th Amendment.*

Defendant contends the State's filing of the petition to revoke probation was untimely, and that delay denied him due process under the 14th Amendment. Defendant cites *Morrissey v. Brewer*, 408 U.S. 471 (1972), which held due process applies to parole revocation procedures. 408 U.S. at 482. The Court stated, "We cannot write a code of procedure; that is the responsibility to each State." 408 U.S. at 488. The Court therefore did not impose any time limits, but did state the following:

The revocation hearing must be tendered within a reasonable time after the parolee is taken into custody. A lapse of two months, as respondent suggests occurs in some cases, would not appear to be unreasonable.

408 U.S. at 488. Defendant cites *Gagnon v. Scarpelli*, 411 U.S. 778 (1973), which held due process applies to probation revocation proceedings, and requires both a preliminary and a final revocation hearing. 411 U.S. at 782. That case did not, however, address any issue about time limits, although it did note the defendant was arrested on August 6, 1965, while committing a burglary, and his probation was revoked on September 1, 1965. 411 U.S. at 779–80. Defendant also cites *U.S. v. Hamilton*, 708 F.2d 1412 (9th Cir. 1983). In that case, the court noted at least 3 years had passed from the time the defendant had violated a condition of his probation and the revocation hearing, and stated, "Revocation of probation after unreasonable delay or under circumstances inherently misleading to the probationer is an abuse of discretion." 708 F.2d at 1414–15.

In the present case, the alleged violation of probation occurred December 27, 2011, and the State filed its petition to revoke on March 5, 2012, which was 68 days later. In light of the Court's statement in *Morrissey* that a "lapse of two months . . . would not appear to be unreasonable," this Court concludes the trial court properly found no violation of due process.

E. (Defendant's Issue Two) *Did the trial court abuse its discretion in refusing to dismiss the prosecution on the ground of untimely disclosure.*

Defendant contends the trial court abused its discretion in refusing to dismiss the prosecution on the ground of untimely disclosure, which was based on his contention that the State failed to comply with Rule 15.1(c) of the Arizona Rules of Criminal Procedure. That rule provides as follows:

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c. Time for Disclosure. Unless otherwise ordered by the court, the prosecutor shall disclose the materials and information listed in Rule 15.1(b) not later than:

- (1) For cases in Superior Court, 30 days after arraignment.
- (2) For Limited Jurisdiction Courts, at the first pre-trial conference.

Rule 15.1(c), ARIZ. R. CRIM. P. By its terms, that rule applies only to pre-trial proceedings and not to proceedings that take place after the defendant has been convicted. *See Canion v. Cole*, 210 Ariz. 598, 115 P.3d 1261, ¶ 9 (2005) (Rule 15 applies only to the trial stage). Moreover, Defendant has failed to indicate where in the record it shows he asked the trial court to dismiss the prosecution for a failure to disclose evidence. Defendant has thus failed to show the trial court erred.

Moreover, in order to obtain relief for a discovery violation, a defendant must show prejudice. *State v. Rienhardt*, 190 Ariz. 579, 586, 951 P.2d 454, 461 (1997). The State's only allegation of a violation of probation was Defendant did not complete the 120 of community service by December 27, 2011. Here Defendant admitted he did not complete his community service by that date. Defendant has thus failed to show any prejudice.

F. (Defendant's Issue Three) *Did the trial court follow the proper procedure at Defendant's revocation arraignment.*

Defendant contends the trial court did not follow the proper procedure his revocation arraignment because his attorney was not present. The applicable rule of procedure provides as follows:

a. Revocation Arraignment.

- (1) The revocation arraignment shall be held no more than 7 days after service of the summons or the probationer's initial appearance under Rule 27.7 before the issuing or assigned judge.
- (2) The court shall inform the probationer of each alleged violation of probation and the probationer shall admit or deny each such allegation.
- (3) If no admission is made or if an admission is not accepted, the court will set a violation hearing, unless both parties agree that a violation hearing may proceed forthwith.

Rule 27.8, ARIZ. R. CRIM. P. For three reasons, this Court concludes Defendant has failed to show he is entitled to any relief. First, that rule does not require a defendant's attorney to be present. Second, assuming that rule did require a defendant's attorney to be present, Defendant never raised with the trial court a claim that the trial court erred in the proceedings. And third, Defendant has failed to show any prejudice. The only thing a defendant must do at the revocation arraignment is either admit or deny the alleged violation of probation, and if the defendant denies the alleged violation, the trial court must set a violation hearing. In this case, the trial court did set a violation hearing (which was held May 21, 2012), which means Defendant must have denied the alleged violation of probation. Defendant has thus failed to show any prejudice.

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G. (Defendant's Issue Four) *Did Judge Tinker rule on an issue that Judge Schattenberg had already resolved.*

Defendant contends Judge Tinker ruled on an issue that Judge Schattenberg had already resolved. Defendant misstates the record. The record shows the following events took place.

1. The State filed a new charge of disorderly conduct against Defendant, and on October 6, 2011, filed a petition to revoke probation based on this new charge of disorderly conduct.

2. At the February 27, 2012, trial before Judge Schattenberg on this new charge of disorderly conduct, the victim did not appear, so the State had to dismiss the disorderly conduct charge and the petition to revoke probation based on that new charge.

3. The State asked Judge Schattenberg to find Defendant had violated probation because he had not completed his community service hours by December 27, 2011.

4. Judge Schattenberg said he could not revoke Defendant's probation based on his failure to complete community service hours because the State had not filed a petition alleging that violation, and if the State wanted Defendant's probation revoked for failure to complete community service hours, the State would have to file another petition to revoke making that allegation.

5. On March 5, 2012, the State filed a petition to revoke Defendant's probation alleging Defendant had failed to complete his community service hours by December 27, 2011.

6. On May 21, 2012, Judge Tinker found Defendant violated the condition of probation because he had failed to complete his community service hours by December 27, 2011, and thus revoked Defendant's probation.

Judge Schattenberg thus never made a ruling one way or another whether Defendant had failed to complete his community service hours by December 27, 2011. Judge Tinker's finding that Defendant had not completed his community service hours by December 27, 2011, therefore was not a ruling on something Judge Schattenberg had already resolved.

III. CONCLUSION.

Based on the foregoing, this Court concludes the trial court correctly denied Defendant's motions and properly conducted the revocation proceedings.

IT IS THEREFORE ORDERED affirming the judgment and sentence of the Surprise Municipal Court.

IT IS FURTHER ORDERED remanding this matter to the Surprise Municipal Court for all further appropriate proceedings.

IT IS FURTHER ORDERED signing this minute entry as a formal Order of the Court.

/s/ Crane McClennen
THE HON. CRANE MCCLENNEN
JUDGE OF THE SUPERIOR COURT

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